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IN THE

Supreme Court of the United States

October Term, 1948.

No. 458.

LAURIE J. CARPENTER,

Petitioner,

v.

ROHM AND HAAS CO., INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT, ROHM AND HAAS CO., INC., IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT, ROHM AND HAAS CO., INC., IN OPPOSITION.

THE CASE BELOW.

The opinion of the United States District Court for the District of Delaware is reported in 75 Fed. Supp. 732 (1948), and the per curiam affirmance of the Court of Appeals for the Third Circuit is reported in 170 F. (2d) 146. The decision of the District Court granting the defendant's motion for summary judgment was on the ground that the plaintiff's claim was barred by the running of the statute of limitations, and the Court of Appeals affirmed on the same ground.

STATEMENT OF THE CASE.

This action was brought in the United States District Court for the District of Delaware by Laurie J. Carpenter, the present petitioner, hereinafter referred to as the plaintiff, against the Rohm and Haas Company, the present respondent, hereinafter referred to as the defendant. The plaintiff asked damages for injuries allegedly sustained by him while he was an employee of the Western Electric Company and caused by a certain product called "Acryloid B-7" which was sold by the defendant to the plaintiff's employer.

The plaintiff in the instant case was employed by the Western Electric Company in its plant at Bayonne, New Jersey, and in its plant in New York City during 1943, 1944 and 1945, as a pressure tester (R. 11). He complained of certain injuries to his health which, he alleged, are a direct result of inhaling the fumes of "Acryloid", an adhesive compound used by his employer for certain purposes in the manufacture of electrical equipment. It should here be pointed out first, that the plaintiff was not employed by the defendant, and secondly, that the plaintiff did not allege that he used the compound of which he complains. The defendant corporation manufactured the compound and sold it to the plaintiff's employer, for use in the employer's plants (R. 13, 14). The plaintiff did not use the compound in his work and was thus not directly exposed to it (R. 11, 12).

As the plaintiff alleged in his complaint, "Acryloid" was supplied by the defendant to the plaintiff's employer in containers which were plainly marked with a warning. The complete legend, which did not appear in the complaint, reads as follows:

"POISON

Avoid prolonged contact with skin. This material contains a volatile solvent which may prove toxic if

vapor is inhaled for extended periods. Use only with adequate ventilation. Symptoms: Drowsiness, dizziness, nausea. Treatment: wrap patient in blanket, provide plenty of fresh air." (R. 13.)

In October, 1943, while employed in the Bayonne plant of the Western Electric Company, the plaintiff reported to the company hospital at Kearney, N. J., and complained of nausea and indigestion which he attributed to fumes from Carbona. At that time he was examined by Dr. Pingitore, and since no ill effects were apparent, he returned to work (R. 11).

In April, 1945, the plaintiff reported to the company hospital at 787 Eleventh Avenue, New York, New York, and complained of pain in the region of the heart, which pain he blamed upon the inhalation of "Acryloid". A medical report of that examination reveals that Dr. Bibbo, the examining physician, discovered no malfunctioning of the heart and ruled out the possibility of "Acryloid" poisoning. It also appears that an investigation was made at the time which definitely revealed that the plaintiff did not use the compound and at most, occasionally smelled it from its use on the next bench, some five or six feet away (R. 12).

The plaintiff was discharged from the Western Electric Company's employed in September, 1945, because the Government contract upon which the plaintiff had been working was terminated (R. 12).

On May 10, 1946, the plaintiff filed a claim under the Workmen's Compensation Act of New York. After several hearings, at which the claimant was instructed to produce medical proof, the claim was disallowed on December 3, 1946, on the grounds that there was no proof of causal connection between the alleged inhalation of "Acryloid" and the alleged disability of the complainant since the plaintiff failed to produce any medical testimony (R. 18).

ARGUMENT.

The decision of the District Court was based upon the Delaware Statute of Limitations raised by the respondent in its answer (R. 9). The statute is found in 5133 Sec. 10, Revised Code of Delaware, 1935, as amended by 46 Del. Laws, Ch. 114 and provides as follows:

> "No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of one year from the date upon which it is claimed that such alleged injuries were sustained. * * *"

There is no reported Delaware case, nor any other known to the respondent, which has interpreted the instant statute in such a way as to be in conflict with the decisions either of the District Court or the Court of Appeals for the Third Circuit in the instant case.

It seems needless to add that the so-called "exception" referred to by the petitioner is completely inapplicable to the instant case. That statute is to be found in 5137 Sec. 14, Revised Code of Delaware, 1935 and provides:

> "*Savings; Infancy; Coverture; Incompetency of Mind:*—If a person entitled to any action comprehended within either of the foregoing provisions, shall have been, at the time of the accruing of the cause of such action, under disability of infancy, coverture, or incompetency of mind, this chapter shall not be a bar to such action during the continuance of such disability, nor until the expiration of three years from the removal thereof."

Even if the petitioner were otherwise within the contemplation of the last mentioned section, that section has expressly been held not to apply to Code Section 5133 by the Superior Court of Delaware in *Nigro v. Flinn*, 8 W. W. Harr. 368, 377, 192 Atl. 685, 688 (1937).

CONCLUSION.

The petitioner has failed to bring himself within the purview of Supreme Court Rule 38 (5), and as this Court said in *Forsyth v. Hammond,* 166 U. S. 506, 514, 17 S. Ct. 665, 41 L. Ed. 1095, 1098,

> "• • • And further, that while this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise. • • •"

In view of the foregoing, it is respectfully submitted that this Court should not grant certiorari in the instant case.

Respectfully submitted,

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